Supreme Court, U.S.
FILED

97 2065 APR 16 1998

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1997

Matthew R. Carroll,
Petitioner

v.

Kermit Black, Charles W. Graham,
William L. Perry, E. Dean Gage
And Walter Wendler,
Respondents

On Petition For A Writ of Certiorari To
The Texas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Matthew R. Carroll, Pro Se
1012 Antone Street
Bryan, Texas 77803
(409) 775-1520

QUESTIONS PRESENTED

1.

Whether the time-keeping actions required by the Fair Labor Standards Act and accompanying regulations, as applied to this case, were ministerial in nature.

2.

Whether the justification advanced by Justice Holmes for sovereign immunity can be applicable where state officials refuse to enforce a higher federal law.

3.

Whether acts of state officials that are contrary to the Fair Labor Standards Act are acts of the state for purposes of immunity.

4.

Whether the Texas Supreme Court erred in failing to enforce its very narrow exception to employment-at-will where state employers asked a state employee to violate a federal law with criminal penalties.

5.

Whether the Texas Supreme Court erred in refusing to enforce the Fair Labor Standards Act on the basis of a state-created common law immunity despite the language of Article VI, Clause 2, of the U.S. Constitution, which is binding on all state courts and provides for supremacy of all laws of the land.

LIST OF PARTIES

A list of all parties to the proceeding in this court whose judgment is the subject of this petition is as follows:

Petitioner: Matthew R. Carroll

Respondents: Kermit Black, E. Dean Gage, Charles W. Graham, William L. Perry, Walter Wendler.

Counsel for Respondents: Blake Brodersen, Assistant Attorney General

Trial Judge: Honorable Carolyn L. Ruffino

TABLE OF CONTENTS

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED..... 2

REQUESTED STANDARD OF REVIEW..... 2

STATEMENT OF THE CASE..... 3

QUESTIONS PRESENTED..... 6

PETITIONER'S ARGUMENT..... 7

CONCLUSION..... 14

INDEX TO APPENDICES

APPENDIX A: Order Granting Defendants' Plea to the Jurisdiction (December 5, 1995)..... 15

APPENDIX B: Opinion of Tenth Court of Appeals (December 18, 1996)..... 16-17

APPENDIX C: Denial of Motion for Rehearing, Tenth Court of Appeals (February 19, 1997)..... 18

APPENDIX D: Denial of Application for Writ of Error, Texas Supreme Court (October 30, 1997)..... 19

APPENDIX E: Motion for Rehearing of Application for Writ of Error, Overruled, Texas Supreme Court (January 16, 1998)..... 20

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Aaron v. State of Kansas, 115 F. 3d 813, 817 (10th Cir. 1997)..... 13

Bender v. Crawford, 33 Tex. 745, 755 (Tex. 1870)..... 11

Blakely v. Fresno Oil Company, 208 S.W.2d 902, 905 (Tex. Civ. App.--Ft. Worth 1948, no writ)..... 3

Bullock v. Hardin, 578 S.W.2d 550, 554 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.)..... 9

Bullock v. Marathon Oil Co., 798 S.W.2d 353, 361 (Tex. App.--Austin 1990, no writ)..... 9

City of Lancaster v. Chambers, 883 S.W.2d 650, 653-654 (Tex. 1994)..... 7

D. & L. Production Co. v. Cuniff, 165 S.W.2d 933, 934 (Tex. Civ. App.--Beaumont 1942, writ dism'd)..... 3

Dickson v. Strickland, 265 S.W. 1012, 1021 (Tex. 1924)..... 12

Dole v. Elliot Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir. 1991)..... 3

Employees v. Missouri Public Health Department, 411 U.S. 279, 298 (1973)..... 13

Galveston H. & S.A. Ry. Company v. Wells, 50 S.W.2d 247, 252 (Tex. 1932) 1941)..... 11

Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985)..... 3

Harris County Flood Control District v. Mihelich, 525 S.W.2d 506, 509 (Tex. 1975)..... 12

Hertz Drivurself Stations, Inc. v. United States, 150 F.2d 923, 929 (8th Cir. 1945)..... 11

In Re Dendy, 175 S.W.2d 297, 303 (Tex. Civ. App.-Amarillo 1943), affirmed, 179 S.W.2d 269, 142 Tex. 460, 151 A.L.R. 1218..... 13

Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)..... 8

Luter v. Hunter, 30 Tex. 688 (1868)..... 11

McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989)..... 3

Matthews v. University of Texas, 295 S.W.2d 270, 272 (Tex. Civ. App.--Waco 1956, no writ)..... 11

Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 214 (1959)..... 10

Nunneley v. Farmers Ins. Exchange, 564 P.2d 231, 234 (Okla. 1977)..... 3

Paul v. Ball, 31 Tex. 10, 15 (1867)..... 12

Pittman v. Time Securities, 301 S.W.2d 521, 523 (Tex. Civ. App.--San Antonio 1957, no writ)..... 12

Public Util. Comm'n v. City of Austin, 728 S.W.2d 907, 911 (Tex. App.--Austin 1987, writ ref'd n.r.e.)..... 9

Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985)..... 10

Sola Electric Co. v. Jefferson Co., 317 U.S. 173, 176 (1943)..... 12

Testa v. Katt, 330 U.S. 386, 389 (1947)..... 12

Texas Department of Health v. Texas Health Enterprises, 871 S.W.2d 498, 506 (Tex. App. --Dallas 1993, writ denied).. 9

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 295-296 (1985). 3

United States Casualty v. Rice, 18 S.W.2d 760, 761 (Tex. Civ. App.--Dallas 1929, writ ref'd)..... 12

STATUTES AND RULES

29 C.F.R., Sec. 516.2 (a) (7)..... 11

29 C.F.R., Sec. 778.102..... 11

29 U.S.C.S., Sec. 211 (c)..... 11

29 U.S.C.S., Sec. 215(a)(5)..... 10

U.S. Constitution, Article VI, Clause 2..... 13, 14

Edwin M. Borchard, *Governmental Responsibility in Tort, V*, 36 YALE L.J. 757, 758-759 (1927)..... 9

Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 196-197 (1981)..... 9

IN THE

Supreme Court of the United States

October Term, 1997

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is reported at 938 S.W.2d 134 (Tex. App.--Waco, 1996).

JURISDICTION

The Texas Supreme Court denied the application for writ of error on October 30, 1997. A copy of that denial letter appears at Appendix D.

A timely motion for rehearing was thereafter denied on January 16, 1998, and a copy of the letter denying rehearing appears at Appendix E.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fair Labor Standards Act provides under Prohibited Acts: Sec. 15. (a): "(I)t shall be unlawful for any person ... (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint ..."

U.S.C., Title 29, Chapter 8 (c) requires state employers to "make, keep, and preserve such records of the persons employed by him and of the wages, hours ... and shall preserve such records ..." The instructions on the back of the time-sheets at issue stated: "Record daily the hours actually worked, to the nearest quarter of an hour."

Article VI, Clause 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This appeal is based upon Article VI, Clause 2 and Title 28, Section 1257 that provides for review of a final judgment or decree rendered by the highest court of a State "where the validity of a ...statute of the United States is drawn in question" or any "right...is claimed under statutes of...the United States."

REQUESTED STANDARD OF REVIEW

All states, including Texas, have a legal duty to comply with the wage and overtime provisions of the FLSA. The Fair Labor Standards Act (FLSA), has been expressly held,

by this Court, to include state employees, including employees of state political subdivisions. Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985).

A Texas court has said of the FLSA: "The Fair labor Standards Act is both a minimum wage law and a maximum hour law. It is obviously intended to promote not merely better wage standards but also a shorter work week, by requiring payment of extra compensation for all time worked over and above the maximum hours per week therein prescribed." D. & L. Production Co. v. Cuniff, 165 S.W.2d 933, 934 (Tex. Civ. App.--Beaumont 1942, writ dism'd). The FLSA is remedial, humanitarian, must be liberally interpreted and not applied grudgingly. Blakely v. Fresno Oil Company, 208 S.W.2d 902, 905 (Tex. Civ. App.--Ft. Worth 1948, no writ). The FLSA defines an employee as "any individual employed" by an employer. Nunneley v. Farmers Ins. Exchange, 564 P.2d 231, 234 (Okla. 1977).

This Court has stated that the definition of "an employee" under the FSLA is exceedingly broad and that the act is to be liberally applied to the furthest reaches. Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 295-296 (1985). The remedial purpose of the FLSA requires that the term "employer" be interpreted more broadly than at common law. Dole v. Elliot Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir. 1991); McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989).

STATEMENT OF THE CASE

For clarity, Matthew R. Carroll will be referred to as Petitioner and Kermit Black, Charles W. Graham, William L. Perry, E. Dean Gage and Walter Wendler will be referred to as Respondents.

This is an appeal based upon an action for constructive discharge arising from the refusal of the Petitioner to sign time sheets that did not accurately state the hours worked by students under his supervision. The Petitioner refused to sign time-sheets with only five hours when the students were actually working eight hours a day. (Tr. 4-5).

Mary Buman, the Accountant at Texas A&M, called the Petitioner, in mid-July, 1992, and told him that time sheets were due and that the students should not have any more than five hours per day. The Petitioner called her attention to the instructions printed on the back of each time-sheet form which stated: "Record daily the hours actually worked, to the nearest quarter of an hour." Her reply was: "That is only the fine print." The Petitioner told her that he simply could not sign his name to things which were not true. (Tr. 5-6).

Kermit Black called the Petitioner on July 31, 1992. He stated: "It's just like having your secretary work overtime, and then giving her a day off in compensation." The Petitioner waited for him to finish, and said: "I'm sorry, I can't sign my name to something that's not true." Respondent Black then said, angrily: "All right I'll do it myself!" (Tr. 7).

On August 5, 1992, Respondent Graham said to the Petitioner: "We want your resignation, or we are going to fire you." When asked why, Graham replied that he was "just following orders." After the Petitioner insisted on an explanation, he said "somebody said something." (Tr. 8).

On August 31, 1992, the Petitioner asked Respondent Wendler if he knew why he had been fired. The Petitioner said to the Dean: "I did everything they wanted me to do,

except falsify the time sheets. They wanted me to put 5 hours per day on the student time-sheets, even though they had been working 8 hours per day. I had to tell them that I simply could not sign my name to things which were not true." (Tr. 10).

Respondent Perry told the Petitioner: "That's against the law, thank you for letting us handle it, you brought it here, and this is where it should be." (Tr. 10-11).

Respondent Black, who signed the time sheets, was then appointed to conduct an investigation. (Tr. 11).

At the conclusion of the investigation, additional payments were then made to all the students totaling approximately $6,000. (Tr. 61).

Mr. Carroll alleged in his petition, filed on August 2, 1994, that it is a criminal offense for any person to knowingly and willfully violate any of the provisions of the Fair Labor Standards Act relating to the keeping of wage and hour records. An employer must total all the hours worked by an employee in a workweek. He further stated that the making of false records required to be kept by the Fair Labor Standards Act is a criminal act and that he was discharged for the sole reason of refusing to perform a criminally illegal act. Under these circumstances, the petition stated, Mr. Carroll was wrongfully discharged. (Tr. 12-13).

In Plaintiff's Motion for New Trial it was specifically stated: "It is undisputed that the Fair Labor Standards Act and related regulations prohibited the actions taken with regard to the time-sheets in this case." (TR 138).

In the Application for Writ of Error, it was pointed out

to the Texas Supreme Court that obedience to federal law is ministerial rather than discretionary. Application for Writ of Error 3 (March 20, 1997). The statutory basis for the suit was the Fair Labor Standards Act (FLSA), as adopted in the *Sabine* case, which allows a private cause of action for damages. It was contended that if legislative consent by the Texas legislature was required, such consent dated from December 1845 when statehood was granted. The laws of the United States were in force in Texas immediately upon her admission to the United States. Application for Writ of Error 27 (March 20, 1997).

In the Motion for Rehearing, it was stated that Federal statutes have been the law of the land since Texas became a state. It was further contended that if Justice Holmes was correct in saying that the basis for sovereign immunity is that there can be no legal remedy against the authority that made the law at issue, then immunity cannot exist where a federal law is disregarded by a state official. Holmes held: "(T)here can no legal right against the authority that makes the law on which the right depends. 205 U.S. 349, 353." Motion for Rehearing of the Denial of the Application for Writ of Error 31 (November 14, 1997).

QUESTIONS PRESENTED

1.

Whether the time-keeping actions required by the Fair Labor Standards Act and accompanying regulations, as applied to this case, were ministerial in nature.

2.

Whether the justification advanced by Justice Holmes for sovereign immunity can be applicable where state officials refuse to enforce a higher federal law.

3.

Whether acts of state officials that are contrary to the Fair Labor Standards Act are acts of the state for purposes of immunity.

4.

Whether the Texas Supreme Court erred in failing to enforce its very narrow exception to employment-at-will where state employers asked a state employee to violate a federal law with criminal penalties.

5.

Whether the Texas Supreme Court erred in refusing to enforce the Fair Labor Standards Act on the basis of a state-created common law immunity despite the language of Article VI, Clause 2, of the U.S. Constitution, which is binding on all state courts and provides for supremacy of all laws of the land.

PETITIONER'S ARGUMENT

1.

The first reason for granting a writ of certiorari is that the Fair Labor Standards Act, and its accompanying regulations, is plainly ministerial in nature.

The employers in this case claimed sovereign immunity by merely asserting they were acting in an "official capacity." Texas law states: "If an act is such that the actor has no choice, where the law prescribes and defines the duties to be performed with such precision as to leave nothing to the exercise of discretion or judgment, it is ministerial." City of Lancaster v. Chambers, 883 S.W.2d

650, 653-654 (Tex. 1994). Recording the hours "actually worked" was clearly a ministerial duty under the Fair Labor Standards Act (FLSA) and accompanying rules. Such instructions were plainly stated in the time-sheets at issue: "Record daily the hours actually worked, to the nearest quarter of an hour." (Tr. 5-6).

2.

The second reason for granting a writ of certiorari is because acts of state officials that are contrary to a federal law are not acts of the state for purposes of immunity. The justification for immunity is that there cannnot be a legal right against the authority that makes the law on which the right depends. Justice Holmes made this point more than nine decades ago:

> (S)ome doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "*Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.*" Bodin, Republique, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, c. 3. *Nemo suo statuto ligatur necessitative. Baldus., De Leg. et Const., Digna Vox* (2d ed., 1496, fol. 51b. Ed. 1539, fol. 61*)*.

Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

Holmes explained that the sovereign was immune on the basis that the state or the law-making authority was "above the law." Edwin M. Borchard, *Governmental Responsibility in Tort, V*, 36 YALE L.J. 757, 758-759 (1927).

Where a claim is based upon a federal law, state officials cannot invoke immunity. Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 196-197 (1981).

3.

The third reason for granting a writ of certiorari is that unlawful acts of state officials are not acts of the state for purposes of immunity

The Respondents were sued in their individual capacity. (Tr. 1). Unlawful Acts by state officials are not acts of the state for purposes of immunity: "If the State commits an act which by statute it may not do, sovereign immunity is not available." Texas Department of Health v. Texas Health Enterprises, 871 S.W.2d 498, 506 (Tex. App.--Dallas 1993, writ denied); Bullock v. Marathon Oil Co., 798 S.W.2d 353, 361 (Tex. App.--Austin 1990, no writ); Public Util. Comm'n v. City of Austin, 728 S.W.2d 907, 911 (Tex. App.--Austin 1987, writ ref'd n.r.e.). A money judgment may be obtained, despite a plea of sovereign immunity, where acts are "not lawfully authorized." Bullock v. Hardin, 578 S.W.2d 550, 554 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.).

4.

The fourth reason for granting a writ of certiorari is because the Texas Supreme Court erred in failing to enforce its very narrow exception to employment-at-will

where state employers asked a state employee to violate a federal law with criminal penalties.

In 1985 the Texas Supreme Court adopted the narrowest exception to the at-will rule--that employers could not order their employees to violate either a state or federal law with criminal penalties. In *Sabine* the Texas Supreme Court stated it was "free to judicially amend a judicially created doctrine." Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985). The Court said that after considering the changes in employer/employee relationship during the intervening 97 years since the *Eastline* holding, "the situation which led to that decision has changed in certain respects." 687 S.W.2d at 735.

The Court then announced: "We now hold that public policy, as expressed in the laws of this state *and the United States* which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine... That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act." 687 S.W.2d at 735 (emphasis added).

Thus, in 1985, the FLSA was incorporated, along with other federal laws, that carry criminal penalties, as an exception to the employment at-will rule in Texas. This adoption by reference was the basis of the suit.

This Court has noted that the FLSA provides for criminal prosecution of will violators. Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 214 (1959). It is a criminal offense for any person to knowingly and willfully violate any of the provisions of the Fair Labor Standards Act relating to the keeping of wage and hour records. 29 U.S.C.S., Sec. 215(a)(5). An employer must total all the

hours worked by an employee in a workweek. 29 U.S.C.S., Sec. 211 (c); 29 C.F.R., Sec. 778.102; 29 C.F.R., Sec. 516.2 (a) (7). The making of false records required to be kept by the Fair Labor Standards Act has been specifically held to be a criminal act. Hertz Drivurself Stations, Inc. v. United States, 150 F.2d 923, 929 (8th Cir. 1945). Any willful violation of 29 U.S.C.S., Sec. 215 is subject to imprisonment for not more than six months. 29 U.SC.S., Sec. 216 (a).

5.

The fifth reason for granting a writ of certiorari is that the Texas Supreme Court erred in refusing to enforce the Fair Labor Standards Act on the basis of a state-created common law immunity because Article VI, Clause 2, of the U.S. Constitution, is binding on all state courts and provides for supremacy of all laws of the land.

Under Article VI, Clause 2 of the U.S. Constitution, it has been held that any conflicting state statute or constitutional provision must fall. Luter v. Hunter, 30 Tex. 688 (1868). The limits also include the treaties and laws of the United States. Bender v. Crawford, 33 Tex. 745, 755 (Tex. 1870).

The Texas Supreme Court conceded in 1932 that the judicial tribunals of each state are the sole judges of the laws of that state, *except* where a question of federal or international law arises. Galveston H. & S.A. Ry. Company v. Wells, 50 S.W.2d 247, 252 (Tex. 1932).

Immunity for negligence of State officials comes from the *common law* rather than from the Texas legislature. Matthews v. University of Texas, 295 S.W.2d 270, 272 (Tex. Civ. App.--Waco 1956, no writ) (emphasis added). Justice Daniel held in 1975: "Governmental immunity...is

not provided by the Texas Constitution; it is court-made law..." Harris County Flood Control District v. Mihelich, 525 S.W.2d 506, 509 (Tex. 1975).

Where there is no applicable statute, the common law controls. United States Casualty v. Rice, 18 S.W.2d 760, 761 (Tex. Civ. App.--Dallas 1929, writ ref'd). In Texas where the common law is inconsistent with a statute, however, the common law must yield. Pittman v. Time Securities, 301 S.W.2d 521, 523 (Tex. Civ. App.--San Antonio 1957, no writ). Statutes and policy cannot be disregarded by the judicial mind "however much it may struggle to escape their trammels." Paul v. Ball, 31 Tex. 10, 15 (1867).

The common law cannot override the Constitution: "It is elementary that a statute or principle of the common law in conflict with the constitution is void." Dickson v. Strickland, 265 S.W. 1012, 1021 (Tex. 1924). The Court added: "(I)f there be any conflict between the common law...and the Constitution...it is our plain duty to give effect to the Constitution." Id. The same rule applies to provisions in the U.S. Constitution; Texas common law cannot override the U.S. Constitution or a law of the land.

A half century ago this Court rejected the Rhode Island Supreme Court's holding that it had no more obligation to enforce a valid penal law of the United States than it had to enforce a penal law of another state or a foreign country. Testa v. Katt, 330 U.S. 386, 389 (1947). This Court has also stated that a state common law cannot be used to set aside a federal statute: "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules." Sola Electric Co. v. Jefferson Co., 317 U.S. 173, 176 (1943). A denial of a federal policy raises a federal question: "When

a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield." Id.

An employee can sue in state court for monetary damages under the FLSA because "a state court of general jurisdiction is *obligated* by the Supremacy Clause to enforce federal law." Aaron v. State of Kansas, 115 F. 3d 813, 817 (10th Cir. 1997) (emphasis added); Employees v. Missouri Public Health Department, 411 U.S. 279, 298 (Marshall, J., concurring) ("(S)ince federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy..").

Article VI, Clause 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It was held in Texas 1943: "There is no law of a state other than as declared by the Constitution or some legislative act. Judicial decisions do not make law-they merely interpret or pronounce law as the same exists." In Re Dendy, 175 S.W.2d 297, 303 (Tex. Civ. App. - Amarillo 1943), affirmed, 179 S.W.2d 269, 142 Tex. 460, 151 A.L.R. 1218. This holding has never been overruled in Texas. As has been pointed out, sovereign immunity in Texas has no basis in either the Texas Constitution or statutes.

Under Article VI, Clause 2, even the Texas Supreme Court lacks the power to set aside a plain federal law with criminal penalties on the basis of a court-created notion of immunity that has no basis in either the Texas Constitution or Texas statutes. Under these facts the Texas Supreme Court was "bound" to follow the law of the land--the Fair Labor Standards Act.

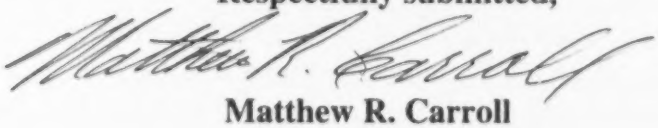
CONCLUSION

Texas employees have long labored under the harsh "employment-at-will" rule that allows employers to fire them with no reason or even a bad reason. The very narrow exception to the "at-will" rule has now been made even more narrow by the failure of the Texas Supreme Court to allow a cause of action here for a blatant disregard of the plain and undisputed accurate time-keeping mandates of the Fair Labor Standards Act.

As the law in Texas now stands, you cannot fire an employee for refusing to violate a state or federal law with criminal penalties *unless* you are a Texas state official.

A result so contrary to any sense of justice and fairness cries out for a swift and essential review of this case. The petition for a writ of certiorari should be granted.

Respectfully submitted,



Matthew R. Carroll

Date: June 19, 1998

APPENDIX A

NO. 40,537-361

MATTHEW R. CARROLL, PLAINTIFF	)(	**IN THE DISTRICT COURT OF**
V.	)(	**BRAZOS COUNTY, TEXAS**
KERMIT BLACK, CHARLES W. GRAHAM, WILLIAM L. PERRY, E. DEAN GAGE, AND WALTER V. WENDLER, DEFENDANTS	)(	**361st JUDICIAL DISTRICT**

ORDER GRANTING DEFENDANTS' PLEA TO THE JURISDICTION

On this day, the Court considered Defendant's Plea to the Jurisdiction, and after considering counsel's arguments and authorities presented, the Court is of the opinion that the Plea should be granted; therefore.

IT IS ORDERED that Defendants' Plea to the Jurisdiction is hereby GRANTED; and

IT IS FURTHER ORDERED that Plaintiff Matthew Carroll take nothing by this suit and that Defendants recover their costs, for which let execution issue.

SIGNED this 5 day of December, 1995.

s/CAROLYN RUFFINO
DISTRICT JUDGE PRESIDING

APPENDIX B

IN THE
TENTH COURT OF APPEALS

NO. 10-96-00049-CV

MATTHEW R. CARROLL,

Appellant

v.

KERMIT BLACK, ET AL.,

Appellees

OPINION
(December 18, 1996)

Matthew Carroll sued several Texas A&M University officials claiming wrongful discharge. The defendants filed a plea to the jurisdiction asserting the defense of sovereign immunity. After a hearing, the court granted the defendant's plea to the jurisdiction. Carroll appeals on one point: Does the *Sabine Pilot* exception to the employment-at-will doctrine apply to public employees asserting the defense of sovereign immunity? *See Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

Texas has long adhered to the employment-at-will doctrine. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888). Some exceptions have been made to the doctrine by statute. See, e.g. TEX. LABOR CODE ANN. Sec. 451.001 (Vernon 1996) (discharge for filing worker's

compensation claim); TEX. GOV'T CODE ANN. Sec. 554.002 (Whistleblower Act) (Vernon Supp. 1996). In 1985, our Supreme Court created a "very narrow" judicial exception to the employment-at-will doctrine: an employer may not discharge an employee "for the sole reason that the employee refused to perform an illegal act." *Sabine Pilot*, 687 S.W.2d at 735.

The appellees do not dispute that the *Sabine Pilot* exception to the at-will doctrine exists. Instead, they argue that the exception does not overcome their defense of sovereign immunity. As state officials who were acting in their official capacity, appellees assert that--absent legislative consent or statutory exception--they are entitled to the immunity defense. See *Bagg v. University of Tex. Med. Branch*, 726 S.W.2d 582, 586 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.).

The justifications for sovereign immunity have long been criticized.[1] *Green Intern., Inc. v. State*, 877 S.W.2d 428, 433 (Tex. App.--Austin, 1994, writ denied, order withdrawn, dism'd). However, the waiver of sovereign immunity is a matter properly addressed to the legislature. *University of Texas Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994).

Because we find neither legislative consent nor a statutory exception to sovereign immunity, we cannot say the trial court erred in dismissing Carroll's writ. We affirm the judgment.

BILL VANCE
Justice

---

[1] **Former Supreme Court Justice William Kilgarlin has filed an amicus curiae brief denouncing the doctrine of sovereign immunity and employment-at-will as "relics of the past."**

APPENDIX C

TENTH COURT OF APPEALS
Post Office Box 1606
Waco, Texas 76703-1606

February 19, 1997

Mr. Eric Samuelson
8604 Dungan Street
Austin, TX 78753

William W. Kilgarlin
Attorney At Law
120 Cantera Circle
Santa Fe, NM 87501

Mr. Blake O. Brodersen
Office of the Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711-2548

RE: Case No. 10-96-049-CV
Style: Matthew R. Carroll
V.
Kermit Black, et al.

Dear Counsel:

Appellant(s) motion for rehearing was denied today.

Sincerely,

s/Imogene Allen, Clerk

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

October 30, 1997

Mr. Eric Samuelson
8604 Dungan Street
Austin, TX 78753

Mr. Blake O. Brodersen
Office of the Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711-2548

RE: Case No. 97-0296
Style: MATTHEW R. CARROLL
V.
KERMIT BLACK, CHARLES W. GRAHAM, WILLIAM L. PERRY, E DEAN GAGE; and WALTER WENDLER.

Dear Counsel:

Today the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied."

Sincerely,

John T. Adams, Clerk

By/s Michael Kopp, Deputy

APPENDIX E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

January 16, 1998

Mr. Eric Samuelson
8604 Dungan Street
Austin, TX 78753

Mr. Blake O. Brodersen
Office of the Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711-2548

RE: Case No. 97-0296
Style: MATTHEW R. CARROLL
V.
KERMIT BLACK, CHARLES W. GRAHAM, WILLIAM L. PERRY, E DEAN GAGE; and WALTER WENDLER.

Dear Counsel:

Today the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case. Motion to permit filing or consideration of *amicus* brief is dismissed as moot.

Sincerely,

John T. Adams, Clerk

By/s Blanca E. Morin, Deputy